

FILED

NOV - 3 2016

CLERK, U.S. DISTRICT COURT

By \_\_\_\_\_

Deputy

ARTURO LEMUS, JR.,

§

Movant,

§

§

VS.

§

NO. 4:16-CV-739-A

(NO. 4:14-CR-105-A)

UNITED STATES OF AMERICA,

§

§

Respondent.

§

MEMORANDUM OPINION AND ORDER

Came on for consideration the motion of Arturo Lemus, Jr. ("movant") under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. After having considered such motion, the government's response, pertinent parts of the record in Case No. 4:14-CR-105-A, styled "United States of America v. Arturo Lemus, Jr.," and applicable authorities, the court has concluded that the motion should be denied.

## I.

Background

Information contained in the record of the underlying criminal case discloses the following:

On May 14, 2014, movant was named in a one-count indictment charging him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). CR Doc.<sup>1</sup> 10. On July 3, 2014,

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<sup>1</sup>The "CR Doc." reference is to the number of the item on the docket in the underlying criminal (continued...)

movant pleaded guilty. CR Doc. 19. At the time, movant was free on bond. Id. One day after disclosure of the presentence investigation report, movant was stopped for a traffic violation and was found to be in possession of drugs and a large amount of cash. CR Doc. 24, 28. His conditions of release were revoked. Cr. Doc. 30. The probation officer then amended the presentence investigation report to take away the three-level reduction for acceptance of responsibility, since movant had failed to withdraw from criminal conduct, and to recommend an upward departure. CR Doc. 32. The court gave the parties written notice through an order signed October 31, 2014, that it had tentatively concluded that a sentence of imprisonment significantly above the top of the advisory guideline range would be appropriate. CR Doc. 36.

At sentencing, the court adopted without objection the findings and conclusions of the presentence investigation report and addendum. Movant's counsel urged that he be sentenced within the guideline range and argued that an upward departure should not be ordered. CR Doc. 46 at 4-8. Movant's brother, sister, and a niece spoke on his behalf. CR Doc. 46 at 9-12. Movant then apologized and purported to take full responsibility for his actions. CR Doc. 46 at 13.

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<sup>1</sup>(...continued)  
case, No. 4:14-CR-105-A.

The court sentenced movant to a term of imprisonment of 120 months. CR Doc. 40. Movant appealed and his sentence was affirmed. CR Doc. 47, 48. United States v. Lemus, 619 F. App'x 404 (5<sup>th</sup> Cir. 2015).

II.

Grounds of the Motion

Movant urges two grounds in support of his motion, worded as follows:

**GROUND ONE:** Unconstitutional sentence pursuant to the recent decision in [Johnson v. United States, 135 S. Ct. 2551 (2015)].

Doc.<sup>2</sup> 1 at 5. As supporting facts, movant says that his sentence was enhanced for prior criminal conduct that has now been ruled unconstitutional.

**GROUND TWO:** Ineffective assistance of appellate counsel on direct appeal.

Doc. 1 at 6. As supporting facts, movant asserts that he was wrongfully denied his three point reduction for acceptance of responsibility due to conduct while on supervised release. He says his attorney failed to argue this at sentencing; hence he received a higher sentence than was called for. Id.

III.

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<sup>2</sup>The “Doc.” reference is to the number of the item on the docket in this civil action.

Standards of Review

A. 28 U.S.C. § 2255

After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S. 152, 164-165 (1982); United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991). A defendant can challenge his conviction or sentence after it is presumed final on issues of constitutional or jurisdictional magnitude only, and may not raise an issue for the first time on collateral review without showing both "cause" for his procedural default and "actual prejudice" resulting from the errors. Shaid, 937 F.2d at 232.

Section 2255 does not offer recourse to all who suffer trial errors. It is reserved for transgressions of constitutional rights and other narrow injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981). In other words, a writ of habeas corpus will not be allowed to do service for an appeal. Davis v. United States, 417 U.S. 333, 345 (1974); United States v. Placente, 81 F.3d 555, 558 (5<sup>th</sup> Cir. 1996). Further, if issues "are raised and considered on direct appeal, a defendant is thereafter precluded from urging the same issues in a later

collateral attack." Moore v. United States, 598 F.2d 439, 441 (5th Cir. 1979) (citing Buckelew v. United States, 575 F.2d 515, 517-18 (5th Cir. 1978)).

B. Ineffective Assistance of Counsel Claims

To prevail on an ineffective assistance of counsel claim, movant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Missouri v. Frye, 566 U.S. \_\_\_, 132 S. Ct. 1399, 1409-11 (2012).

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697; see also United States v. Stewart, 207 F.3d 750, 751 (5th Cir. 2000). "The likelihood of a different result must be substantial, not just conceivable," Harrington v. Richter, 562 U.S. 86, 112 (2011), and a movant must prove that counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (quoting Strickland, 466 U.S. at 686). Judicial scrutiny of this type of claim must be highly deferential and the defendant must

overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689.

IV.

Analysis

In his first ground, movant simply refers to Johnson, not even giving a proper citation. He does not allege any facts to support any claim that his sentence was improperly enhanced. Although the motion is to be liberally construed, mere conclusory allegations on critical issues are insufficient to raise a constitutional issue. United States v. Pineda, 988 F.2d 22, 23 (5<sup>th</sup> Cir. 1993). Movant was not sentenced based on prior violent felonies or serious drug offenses.

In his second ground, movant says that he received ineffective assistance of counsel. He has not made any attempt to overcome the strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689. The record reflects that movant continued to engage in criminal activity while on bond. Failure to terminate or withdraw from criminal conduct or associations is a factor the court may take into account when determining whether the defendant has demonstrated acceptance of responsibility. USSG § 3E1.1, comment. (n.1). The failure to raise a meritless claim

cannot be ineffective assistance of counsel. United States v. Kimler, 167 F.3d 889, 893 (5<sup>th</sup> Cir. 1999).

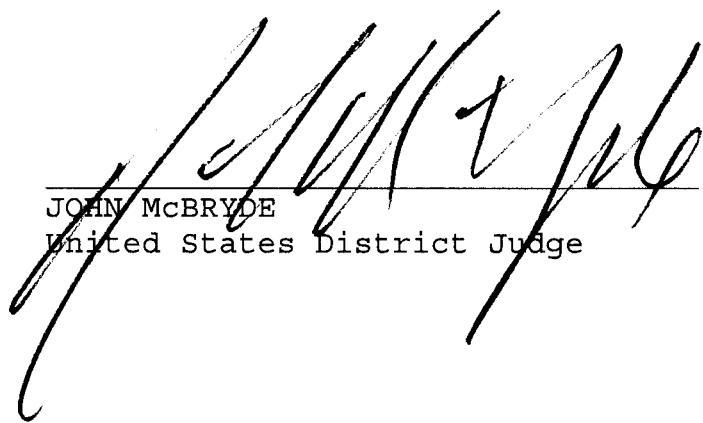
V.

Order

The court ORDERS that all relief sought by movant in his motion under 29 U.S.C. § 2255 be, and is hereby, denied.

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts, and 28 U.S.C. § 2253(c)(2), for the reasons discussed herein, the court further ORDERS that a certificate of appealability be, and is hereby, denied, as movant has not made a substantial showing of the denial of a constitutional right.

SIGNED November 3, 2016.

  
JOHN McBRYDE  
United States District Judge